

IN THE SUPREME COURT OF CHARLESTON, WEST VIRGINIA CHARLESTON

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No. 32901

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MARY ROSE

Plaintiff, Appellee

vs.

BILLY WAYNE DUNLAP

Defendant, Appellant

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APPELLANT BRIEF

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Friday, January 6, 2006

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MARY ROSE

Plaintiff, Appellee

v.

BILLY WAYNE DUNLAP

Defendant, Appellant

No. 32901

APPELLANT'S BRIEF

Now comes Defendant, Billy Wayne Dunlap, Appellant's Brief pursuant to Rule 28 of the West Virginia Supreme court of Appeals, Rules of Appellate Procedure.

A. Background: On October 1, 1999, the Circuit Court of Randolph County, the Honorable John L. Herring, issued charges against Plaintiff, Mary Rose, for inappropriate sexual contact of the minor daughter, Serena Rose Dunlap. Testimony included an admission from the Plaintiff that her daughter had touched her husband's penis and essentially she saw nothing wrong with that. Plaintiff also testified concerning her and her husband's nudist lifestyle. The courts granted a change of custody and scheduled an expedited hearing before the Family Law Master to address the issues of visitation for the Plaintiff and her obligation to pay child support. On the May 7, 2003, a court order was issued establishing permanent child custody to the Defendant.

On August 16, 2004, a Final Order was granted even though the Defendant was unable to take part in the hearing. The Family Court was made aware of Defendant's reasons for late arrival due to unforeseen traffic and construction encountered from Pennsylvania to Elkins, West Virginia, specifically outside of Peterstown, West Virginia. Plaintiff's counsel, Charles Phelan, acting as official representative of the court in this case (who prepared orders for the Family

Court Justice and also coordinated the Family Court schedule) was also notified by Defendant of Defendant's late arrival. Without Defendant's consent, Charles Phalen submitted Defendant's working draft copy of his proposed parenting plan as evidence to the Court.

The Court proceeded with the hearing with complete disregard of these facts and, therefore, Defendant and Counsel Pro Se was unable to present his final individual parenting plan to the court and additional data in regard to visitation issues. The hearing was scheduled from 1:30pm to 4:00pm on August 16, 2004. The Defendant and witness arrived at 2:10pm and upon arrival, Defendant attempted to attend the hearing with Judge Wilfong. The Defendant was met by the bailiff who indicated that the Judge would not speak to Defendant. This delay by the bailiff lasted fifteen minutes in the reception area. It was indicated to Defendant, who has been Counsel Pro Se throughout these proceedings, by the bailiff that only attorneys could speak to the Judge, even though Defendant informed the bailiff he was Counsel Pro Se in this case. Since Defendant had requested two and one half hours of the court's time and considering how long it has taken for these issues to come to formal hearing, it would have behooved the court and Plaintiff's counsel to delay the hearing for the forty-five minutes requested by Defendant via telephone.

In the Status Order dated March 17, 2004, it was indicated, "the Court will set the matter for an all day hearing on or before June 30, 2004." In addition, the Court indicated that this would be a formal hearing, unlike the previous conference calls, so that the Defendant and Plaintiff could present witnesses. A witness accompanied the Defendant to the formal hearing on that day. The action taken by the Family Court Judge to expedite the case and put this order in place took less than 30 minutes. Defendant feels that the Judge took advantage of Defendant's requested lateness to bring this case to a conclusion. This case has been outstanding in the courts

since October of 1999 due to delays from the Family Court, Plaintiff and Plaintiff's Counsel. Plaintiff's changing of counsel three times has caused additional delays. On November 29, 2004, a hearing was held upon the Petition for Appeal with Judge Henning. Judge Henning directed the parties to meet immediately and attempt to negotiate the Plan. On January 26, 2005 the Defendant Billy Wayne Dunlap, pro se presented to the Supreme Court of Appeals Petition for Appeal and upon consideration whereof, the court is of opinion to and doth hereby grant said Petition of Appeal.

B. Ground One: Defendant who is the legal and permanent custodial parent of minor child, Serena Rose Dunlap, resides with Defendant in the state of Pennsylvania. Order entered on May 30, 2000, by the Family Law Master, ordered Plaintiff Mary Rose to pay One Hundred Ninety-Six and 25/100 (\$196.25) per month for the support, maintenance and education of the minor child, commencing on May 1, 2000. The court order was modified entered August 27, 2003 for Defendant to receive a total of One Hundred Thirty-One and 00/100 (\$131.00) per month commencing on July 1, 2003 in support of the child, Serena Rose Dunlap support payments to be received from Plaintiff.

Plaintiff is entitled to visitation with said child one weekend per month on the second or fourth weekends of every month beginning on Friday at 8:00 PM until Sunday at 6:00 PM. The Courts have placed a financial and health related hardship on the Defendant's family if required to meet in Shippensburg, Pennsylvania on a monthly basis during the school year. The exchange of said minor child should take place at the residence of the minor child and Defendant. As a service disabled veteran this extreme amount of travel is detrimental to Defendant's health. For one weekend the round trip distance is 688 miles at 44.5 cents (per IRS/Treasury Department Option standard mile rate for 2006) per mile which is \$306.16, plus \$32.00 for state tolls; thus,

the total cost is \$338.16 per weekend per month. The total hours of drive time per weekend is 15 hours. Also the cost of the exchange is more than the Plaintiff is providing in child support to the Defendant causing the Defendant to pay an additional \$207.16 per month out of pocket. This action does not allow for any monies to be used in the support, maintenance and education of minor child Serena Rose Dunlap. When minor child, Serena Rose Dunlap, was residing in West Virginia with Plaintiff, an order entered on January 5, 1998 of the Family Court of Randolph County, West Virginia stated that all exchanges of the minor child must be made in the state in which she was residing which was the state of West Virginia forcing the Defendant to bear all costs in regard to gas, time, tolls and accommodations in pursuit of the visitation of minor child Serena Rose Dunlap.

Relief Sought: Therefore, since the minor child resides with the legal custodial parent in the state of Pennsylvania and has for the past 6 years, the exchange of said minor child should be made at the permanent residence of the child which is the State of Pennsylvania and thus, would not cause any hardships for the child or Defendant. If the Defendant's resident location is not acceptable, then the Defendant is requesting that the Plaintiff's support payments be increased to offset the monthly visitation costs incurred by Defendant.

C. Ground Two: The Defendant Billy Wayne Dunlap is under and obligated to pay child support in the amount of Four Hundred and 00/100 (\$400.00) per month beginning on October 1997, pursuant to and order entered on January 5, 1998. The Court Order entered on May 30, 2002, indicated that Billy Wayne Dunlap's child support obligation terminated October 1, 1999 and that Mary Rose's child support obligation commenced on May 1, 2000. There is an inconsistency here. The child support obligation for Plaintiff Mary Rose should be effective the same date of October 1, 1999. The Court denied Defendant Billy Wayne Dunlap's request to

establish a child support obligation for Mary Rose for the period of October 1, 1999 through April 30, 2000.

A verbal agreement did exist and Defendant's child support payment funds were held by the Bureau for Child Support Enforcement and applied to the outstanding arrearages in this matter, and the remainder, if any, was refunded to the Defendant, Billy Wayne Dunlap. On May 13, 1999, based on the child support letter received from R. Mike Mullens, Defendant's attorney of record at the time, the money to be returned after deductions was \$3,000.00 and would bring Defendant's account current until June 1, 1999. On June 16, 1999, based on the letter received from R. Mike Mullens, Attorney, Defendant Billy Wayne Dunlap was informed that a Judge's Order was issued on the matter of the refund and also stated that since June 1, 1999 has passed, the refund would be \$3,200 and in late October 1999. Defendant Billy Wayne Dunlap received a check for \$2,059.00 less any arrears owed by the Defendant. If any monies were still owed at the time, the Child Support Enforcement would have applied it to any outstanding arrearages in this matter. There would be no arrearage due for either party since it was agreed that the three months would be suspended which was also stated in the court tapes since the Defendant had emergency custody of Serena Dunlap since June 25, 1999. Child Support compensation was also given to Plaintiff for seven months (October 1, 1999 to April 30, 2000) even though there was a verbal agreement made between all parties stating that the dollar amount during that time would offset each other and no further action was to be taken. However, in a Court Order entered on May 30, 2002, almost two years later, arrearages were applied to Defendant's assets for the three months while the Defendant had emergency custody of Serena Dunlap during that period. Also, no action was taken by the Courts to compensate the Defendant for the Plaintiff seven months of non-payment of support during the Family Law Master review of obligation of Plaintiff to pay

child support. On May 7, 2003 Defendant Billy Wayne Dunlap was ordered to paid arrearages from June 1999 through August 1999 in the amount of One Thousand Two Hundred Sixty-Two and 05/100 (\$1,262.05) and interest in the amount of Four Hundred Sixty-Two and 91/100 (\$462.91) for child support.

Relief Sought: Defendant is requesting that One Thousand Two Hundred Sixty-Two and 05/100 (\$1,262.05) in principal and all interest during the time of emergency custody be reimbursed back to Defendant totaling One thousand Seven Hundred Twenty-Four and 96/100 (\$1,724.96).

D. Ground Three: After the court hearing on November 29, 2004, with Judge Henning, a meeting took place with Charlie Phelan, attorney for plaintiff, Plaintiff Mary Rose and Defendant and Attorney Pro Se Billy Dunlap. At that time it was agreed that:

1) Telephone contact between the Plaintiff and child, Serena Rose Dunlap, can occur daily and should take place between 8:30PM until 9:00 PM during the weekdays and weekends.

2) If Plaintiff wants to visit with child, Serena Rose Dunlap, an additional weekend in the state of Pennsylvania, the cost of this trip will be the total responsibility of Plaintiff - i.e. expense and travel/tolls. During this meeting it was also agreed that Plaintiff Mary Rose must provide forty eight hour notice and since this visit would be an additional visit to the regularly scheduled monthly visit, if the Defendant has previous plans for the child at that particular time, then the visit could be denied. This was also left out of the order.

3) Defendant never agreed to meeting half way but only suggested a location for both parties to meet by reviewing Mapquest. Under the Order of the Court entered on December 22, 2004 the Defendant was forced to select Shippensburg, Pennsylvania as a mid point because of the excessive expense of tolls that Defendant would incur and the Plaintiff would not incur. Per

the court order, if the location is not acceptable to Defendant or Plaintiff, then the location reverts back to the original destination of Washington DC which was never agreed upon by Defendant. The Defendant has continually requested the pickup location for the minor child to be the custodial residence in the State of Pennsylvania which has been denied.

4) The visitation of grandparents with the child should be incorporated in the visitation times with either the Plaintiff or Defendant. The parties would adhere to the child's request for visitation with grandparents of either the Plaintiff or Defendant and it will become each party's responsibilities regarding costs for these visits. Grandparents and relatives in this plan have one week visitation timeframe during the summer vacation. Minor child, Serena Rose Dunlap, has visited with both sets of grandparents during the summer vacation months every summer since October 1999.

Relief Sought: Defendant is requesting that items one through four be incorporated into the final order.

E. Ground Four. The minor child, Serena Rose Dunlap, is allowed to sleep in the same household with Plaintiff's husband, Charles Rose under the supervision of Plaintiff, Mary Rose, who has previously admitted to watching the inappropriate sexual contact between minor child and the Plaintiff's husband. With respect to Charles Rose "not to be left alone at any time" with Serena Rose Dunlap, the Defendant has concerns even today with the Plaintiff's ability to supervise minor children. Defendant is aware that Plaintiff has allowed minor child, Serena Rose Dunlap, to go unsupervised into deep ocean water and as a result of such incident, a life guard had to rescue said minor child. In another occurrence, less than one year ago, Plaintiff allowed two minor teenage children to sleep in the same bed who then engaged in sexual conduct while Plaintiff and Plaintiff's husband were in the next room sleeping. Also, Plaintiff has asked

the minor child, Serena Rose Dunlap, to lie to Defendant on numerous occasions regarding Plaintiff's unannounced and unapproved surprise visits while minor child was visiting with minor child's Grandmother. The Defendant has been informed that the Plaintiff has had discussions on several occasions with other minor and adult relatives relating to Serena Rose Dunlap's conception that is extremely inflammatory and damaging to the Defendant. Since the Circuit Court of Randolph County, West Virginia, the Honorable John L. Herring, concluded on October 1, 1999, and issued charges against Plaintiff, Mary Rose, for inappropriate sexual contact of the minor daughter, Serena Rose Dunlap; testimony which included an admission from the Plaintiff that her daughter had touched her husband, Charles Rose's penis and essentially stating that she saw nothing wrong with that particular act. Plaintiff also testified regarding her and her husband's nudist lifestyle. The Circuit Court found, therefore, that there was inappropriate sexual contact between said child and the Plaintiff's husband. The Circuit Court and Family Court has now ordered in the Final Order dated December 22, 2004, that Charles Rose can have physical contact with the minor child, Serena Rose Dunlap, and minor child is allowed in the company of Charles Rose, without supervision other than the Plaintiff. This provides no safe or controlled environment for minor child. Defendant's minor child, Serena Rose Dunlap has reported during visits to Plaintiff's residence that there is no consistent running water having to depend on rain water collection only and that the only sleeping arrangement for minor child is a bunk bed in the same small room with minor child's 9 year old half brother. There is no privacy provided to the minor female child as she is starting to mature. The Defendant fears for the health and safety of body and mind of Defendant's minor child, Serena Rose Dunlap.

Relief Sought: The Defendant is requesting the right to have the West Virginia Child Protection Services supervise and allow monitoring the household on random checks while the minor child is visiting with the non-custodial parent in West Virginia.

F. Ground Five: Also, during all requested visitation to West Virginia, Plaintiff is employed full time and not at home for 8 – 10 hours during the day or night depending on shift. The Family Court has not defined the level of maturity or age of the person who can supervise the minor child, Serena Rose Dunlap, while Plaintiff is not present and the minor child is possibly in the company of Charles Rose, Plaintiff's husband.

Relief Sought: The Defendant is requesting the level of maturity or age of the person who can supervise be 21 years of age or older and the right to have the West Virginia Child Protection Services supervise and allow monitoring the household on random checks while the minor child is visiting with the non-custodial parent in West Virginia.

G. Ground Six: There is nothing stated in the Order that requires or confirms that a babysitter that oversees minor child Serena Rose Dunlap has been approved through Child Protective Services or the West Virginia Police to ensure that minor child is being safeguarded.

Relief Sought: The Defendant is requesting the level of maturity or age of the person who can supervise be 21 years of age or older and the right to have the West Virginia Child Protection Services approve and monitoring the babysitter providing random checks while the minor child is being supervised in West Virginia while non-custodial parent is at work. Also, babysitters that oversee minor child Serena Rose Dunlap must provide evidence of police check or state licenses.

H. Ground Seven: The Family Court's Orders entered September 02, 2004 and entered May 20, 2003 disregarded procedure by not providing a formal written response to Defendant's Objection. Defendant Billy Wayne Dunlap had requested that Plaintiff Mary Rose reimburse

Defendant for the cost of his court ordered psychological evaluation. The Circuit Court of Randolph County did not require a psychological evaluation of the Defendant and only scheduled a hearing before the Family Law Master to address the issues of visitation for the Plaintiff and her obligation to pay child support. Plaintiff requested the court to order a psychological evaluation from Defendant; and Plaintiff indicated that she would pay for the evaluation. The court tapes will support that fact. No action was taken by the Family Court to review the court tapes to support this allegation. The psychological evaluation was requested in support of Plaintiff Mary Rose's appeal to the Supreme Court of Appeals which was denied and was an unnecessary expense placed on the Defendant. Plaintiff Mary Rose testified that she underwent at least one (1) psychological evaluation as part of the custody dispute and bore the cost of the evaluation herself although she failed to state that this action was taken because of the previous threat to the child regarding inappropriate sexual contact and was ordered by Child Protective Services. No documentation was provided to support the fact that Plaintiff paid for said evaluation.

Relief Sought: Defendant is requesting that 100% of the cost of the Defendant's psychological evaluation be paid in the amount of One Thousand Eight One and 70/100 (\$1,081.70) to be reimbursed to Defendant.

I. Ground Eight: On May 7, 2003 Defendant Billy Wayne Dunlap provided documentation to the court that showed that Plaintiff owes him One Thousand Nine Hundred Fifty-Eight and 49/100 (\$1,958.49) in medical expenses for the expenses for the child that were not paid or covered by the insurance company for the period of 1999 and 2001. Medical expenses claimed by Billy Wayne Dunlap are for the cost of medical insurance provided by Barbara Dunlap, Defendant's wife, which the court finds as a non-reimbursable expense.

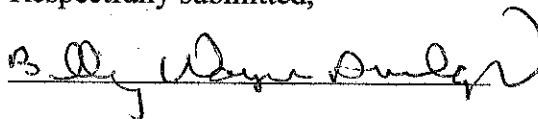
Defendant's wife medical coverage covers the entire family under joint household and should be considered a reimbursable expense for any member of the family. However, Court Order entered August 27, 2003 ensured that Defendant shall pay 58% and Plaintiff shall pay 42% of all medical, hospitalization, dental, orthodontic, optical and pharmaceutical expenses incurred by or on behalf of the minor child and not cover by insurance, including deductible, if any.

Defendant Billy Wayne Dunlap also paid cash out of pocket for one-to-one counseling of Six Hundred and 00/100 (\$650.00), for treatment of minor child Serena Rose Dunlap as a result of the mental/emotional distress that were produced by Plaintiff inappropriate actions.

Relief Sought: Defendant's requests Plaintiff's share (50%) of uncovered medical expenses for the minor child for the period of 1999 through 2001 in the amount of Nine Hundred Seventy-Nine and 25/100 (\$979.25). However, Defendant Billy Wayne Dunlap also requests reimbursement from Plaintiff for all monies paid (100%) for out of pocket cash by Defendant for one-to-one counseling Six Hundred and 00/100 (\$650.00), treatment for Serena Rose Dunlap as a result of the mental/emotional distress that were produced by Plaintiff actions. Totaling One Thousand Six Hundred Twenty-nine and 25/100 (\$1,629.25).

WHEREFORE the Defendant respectfully requests that the Supreme Court of Appeals review and reverse in part and recommend those changes be incorporated into the Final Order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

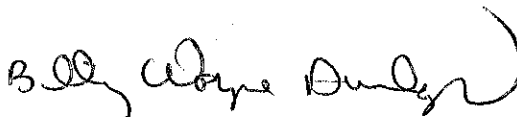
I hereby certify that on this 6th day of January 2006, a copy of the foregoing

APPELLANT'S BRIEF was mailed First Class Mail to the following:

Clerk of Supreme Court  
Supreme Court of Appeals  
1900 Kanawha Blvd East  
State Captial Complex  
Building One, Room E317  
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Philip D. Riggleman, Clerk  
Circuit Court of Randolph County  
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Elkins, WV 26241  
Attention: Honorable John L. Henning, Jr.



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Pro Se